

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

**Amendment of the Commission's
Space Station Licensing Rules and
Policies**

**2000 Biennial Regulatory Review –
Streamlining and Other Revisions of
Part 25 of the Commission's Rules**

IB Docket No. 02-34

IB Docket No. 00-245

**COMMENTS OF HUGHES NETWORK SYSTEMS, INC., HUGHES
COMMUNICATIONS, INC., AND HUGHES COMMUNICATIONS
GALAXY, INC.**

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TABLE OF CONTENTS

	Page
<u>I. A SUCCESSFUL LICENSING SYSTEM SHOULD NOT BE DISCARDED ...</u>	<u>2</u>
<u>A. THE COMMISSION’S LICENSING SYSTEM IS NOT BROKEN</u>	<u>2</u>
<u>B. THE STATED PREMISES FOR CHANGING SATELLITE LICENSING PROCEDURES ARE UNFOUNDED</u>	<u>5</u>
<u>1. <i>Delays does not require the proposed solution.</i></u>	<u>5</u>
<u>2. <i>Nothing about today’s technology, as such, would justify a “first come” licensing approach.</i></u>	<u>7</u>
<u>3. <i>The Commission should of course improve its procedures where possible.</i></u>	<u>7</u>
<u>II. FIRST-COME FIRST-SERVED IS LEGALLY UNSUSTAINABLE.</u>	<u>8</u>
<u>A. THE COMMUNICATIONS ACT DOES NOT AUTHORIZE FIRST-COME LICENSING</u>	<u>9</u>
<u>B. FIRST-COME LICENSING WOULD VIOLATE ASHBACKER</u>	<u>11</u>
<u>1. <i>Controlling authority precludes a pure first-come licensing system.</i></u>	<u>11</u>
<u>2. <i>FM Radio does not save first-come licensing.</i></u>	<u>14</u>
<u>a. <i>FM Radio lacks precedential authority.</i></u>	<u>15</u>
<u>b. <i>FM Radio was unlike the first-come proposal.</i></u>	<u>16</u>
<u>i. <i>FM Radio provided notice.</i></u>	<u>16</u>
<u>ii. <i>FM Radio provided a 30-day filing window.</i></u>	<u>17</u>
<u>iii. <i>The proposed first-come licensing scheme lacks the important procedural safeguards provided by FM Radio.</i></u>	<u>18</u>
<u>3. <i>The plain terms of Section 309 preclude first-come licensing.</i> ..</u>	<u>20</u>
<u>C. NOTHING WOULD SUPPORT A REVERSAL OF AGENCY POLICY UNDER THESE CIRCUMSTANCES.</u>	<u>21</u>
<u>III. FIRST-COME FIRST-SERVED LICENSING OF SATELLITES IS NOT FEASIBLE</u>	<u>23</u>
<u>A. FIRST-COME LICENSING WOULD CREATE HARMFUL UNCERTAINTY</u>	<u>23</u>
<u>B. A FIRST-COME APPROACH WOULD NOT BE AS SIMPLE AS SUGGESTED. .</u>	<u>24</u>
<u>1. <i>The “ancillary rules” would leave first-come licensing complicated, and still exposed to gamesmanship.</i></u>	<u>25</u>
<u>a. <i>The proposed rules would not prevent gamesmanship.</i></u>	<u>25</u>
<u>b. <i>Eliminating antitrafficking and financial requirements will facilitate gamesmanship and speculation.</i></u>	<u>27</u>
<u>c. <i>The Commission’s proposed safeguards would complicate legitimate business affairs and hinder administrative efficiency.</i></u>	<u>28</u>
<u>2. <i>U.S. applicants would suffer at the ITU.</i></u>	<u>32</u>
<u>3. <i>First-come may not save any time at all.</i></u>	<u>33</u>
<u>IV. “STREAMLINED LICENSING” WOULD NOT BE STREAMLINED.</u>	<u>35</u>
<u>A. THE FCC SHOULD ENFORCE ITS RULES, NOT INVENT NEW ONES.</u>	<u>35</u>

B.	THE PROPOSED SELECTION CRITERIA WOULD HARM, NOT HELP	37
1.	<i><u>The proposed criteria would in fact lead to greater indeterminacy.</u></i>	38
2.	<i><u>The preferences lack policy justification.</u></i>	40
V.	<u>THERE ARE BETTER WAYS TO IMPROVE SATELLITE LICENSING...</u>	42
A.	THE EXISTING SYSTEM PROVIDES IMPORTANT BENEFITS.....	42
B.	FCC SHOULD ENFORCE ITS EXISTING RULES.....	43
1.	<i><u>Financial qualification requirements serve an important “early warning” purpose.</u></i>	43
2.	<i><u>“Mandatory expenditure” milestones would not work well.</u></i>	45
C.	CERTAIN INCREMENTAL IMPROVEMENTS WILL FACILITATE THE EXISTING PROCESS.....	46
D.	FACILITATE THE SETTLEMENT PROCESS.....	47
VI.	<u>FUNGIBILITY IS A CORNERSTONE OF SUCCESSFUL SATELLITE LICENSING POLICY.</u>	48
VII.	<u>THE COMMISSION SHOULD MAINTAIN ITS ANTI-TRAFFICKING RULES</u>	49
VIII.	<u>THE COMMISSION SHOULD ROUTINELY AUTHORIZE REPLACEMENT SATELLITES.</u>	51
IX.	<u>THE COMMISSION SHOULD ALLOW, BUT NOT MANDATE, ELECTRONIC FILING</u>	51
X.	<u>CONCLUSION</u>	52

EXECUTIVE SUMMARY

First-come first-served licensing is a disaster waiting to happen – the quintessential case of discarding the baby with the bathwater. Instead of looking for a single panacea for all the complexities inherent in a satellite licensing process, the Commission should carefully determine any specific issues in its current licensing procedures, and specifically address the problems it proposes to solve. Satellite licensing does not require a radical overhaul, it requires a candid appraisal of what is wrong, and appropriate remedial action.

The *Notice* starts down the wrong path as it misidentifies the problem. It is easy to take potshots at the length of time that satellite applications consume: The Celsat application, almost a decade from start to finish, makes a good poster child. But the *Notice* fails to ask *why* those applications took so long to process. Again, Celsat makes a good example: Celsat proposed a fundamental reallocation of spectrum, and novel service rules. In other words, the Celsat proceeding was less about an individual licensing decision; Celsat – like many satellite proceedings – involved a spectrum turf war. First-come first-served licensing would have done nothing to remedy the Celsat “problem.”

Indeed, the “problem,” such as it is, does not lie with the licensing scheme itself. The problem lies with how the Commission has applied its rules and policies – or failed to apply them, as the case may be. Instead of looking for a panacea, the Commission should focus its efforts on incremental improvements. The Commission should:

- Enforce its existing rules, in particular its basic licensee qualification requirements.
- Not delay public notice of new applications – issue PNs promptly after receiving an application.
- Set and strictly enforce deadlines for negotiations among parties in processing rounds – and be prepared to make difficult decisions when negotiations fail.
- Act as a mediator to facilitate negotiations in processing rounds.

These specific improvements are certain to speed up the licensing process; by contrast, first-come licensing is certain to complicate and disrupt that process.

As the *Notice* suggests, a first-come scheme would require a complex web of implementing regulations, along with ancillary measures designed to reduce the ability to game the system. Yet despite the most careful – and indeed, Byzantine – regulations, first-come licensing would still remain susceptible to socially inefficient and detrimental gamesmanship. Speculators and greenmailers would jam up the queues, and even legitimate applicants would need to file preemptive (and ultimately wasteful) applications. Particularly with the proposed relaxation of antitrafficking and financial qualification rules, first-come licensing would be a fertile ground for speculation and game-playing.

But even if first-come licensing were a good idea – even if it held some policy justification – the Commission still would lack authority to implement that policy. The Communications Act spells out in exquisite detail the three methods by which the FCC may award licenses: by lottery, by auction, or by public interest determination.

Period. First-come licensing is none of these, and it lacks any statutory basis whatsoever. Likewise first-come licensing violates the unequivocal mandate of the Supreme Court and of the United States Court of Appeals for the D.C. Circuit, that mutually exclusive applicants be afforded a comparative hearing. Nor is first-come saved by the FCC's *FM Radio* licensing scheme, which was not a "true" first-come scheme, but provided an opportunity for potentially mutually exclusive applicants to file within a defined window.

First-come licensing is a bad idea. It would be bad policy, and more importantly, it is unsustainable as a matter of law.

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**COMMENTS OF HUGHES NETWORK SYSTEMS, INC., HUGHES
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GALAXY, INC.**

Hughes Network Systems, Inc., Hughes Communications, Inc. and Hughes Communications Galaxy, Inc. (collectively, "Hughes") submit their Comments in response to the Commission's *Notice of Proposed Rulemaking*¹ in this proceeding.

The Hughes family of companies have long been leaders in the field of satellite communications. Hughes has participated in almost every FSS processing round in the past 20 years, has held many spacecraft licenses issued by the Commission, and has constructed, launched and operated numerous spacecraft. Hughes also is a leading manufacturer and operator of VSAT networks, many of which rely upon spacecraft that

¹ Amendment of the Commission's Space Station Licensing Rules and Policies, 2000 Biennial Review, *Notice of Proposed Rulemaking and First Report and Order*, IB Dkt Nos. 02-34, 00-245 (rel. Feb. 28, 2002) (the "*Notice*").

are licensed by the Commission. Thus, Hughes is uniquely qualified to comment on the impact of the proposed changes to the Commission's space station licensing procedures.

I. A SUCCESSFUL LICENSING SYSTEM SHOULD NOT BE DISCARDED.

A. The Commission's Licensing System Is Not Broken.

The United States satellite industry is robust, competitive and innovative. It provides innumerable benefits to all U.S. consumers – rural, suburban and urban, business and residential, alike – who have seamlessly integrated satellite technology (often unknowingly) into their daily routines. Consumers use Commission-licensed spacecraft to authorize credit card transactions. They read national newspapers like the *Wall Street Journal*, printed locally with content delivered by satellite. The vast majority of television content is delivered by satellite, whether direct-to-home in the DBS band, or over FSS spacecraft to cable head ends. U.S.-licensed FSS spacecraft provide high-speed Internet service for many consumers and U.S. consumers rely on satellites to provide many critical emergency response communications. Consumers have benefited, and continue to benefit, from satellite technologies.

Thousands of U.S. companies owe their success at least in part to the Commission's successful satellite licensing procedures. The Commission has licensed dozens of companies and those licensees have deployed hundreds of spacecraft. Capacity on those spacecraft, in turn, is sold or leased to retailers, broadcasters, cable television systems, manufacturers, health care providers, government agencies, communications providers and other end users. Both individual and business consumers have seen great benefits from the rapid development of the satellite industry, as prices for telecommunications services have decreased, new services have become available, and

telecommunication and video distribution links have been extended to parts of the country that are unserved by terrestrial services. And there is no end in sight: the future promises even greater innovations and consumer benefits.

The American people have realized these benefits in large part through the leadership of the U.S. satellite industry. There can be no real doubt that the United States has led the world, and continues to dominate, in satellite design, manufacture, and operation. This situation is no accident. The Commission's current processing round based licensing mechanism, and its "open skies" policies, have put orbital locations and spectrum resources into the hands of those who can use them, and have ensured that those resources are exploited fully and efficiently, and in the public interest. The Commission is correct to congratulate itself when it states in the *Notice*: "The success of the U.S. satellite industry is due, at least in part, to the Commission's current satellite licensing process."²

Certainly, there are delays that occur in the Commission's processing procedures. Many of those delays, however, arise not from the procedures themselves, but from the Commission's failure to act in a way that would make those procedures work. Among these are the Commission's decision not to place certain applications on public notice promptly after they are filed, and its failure to resolve, or even seriously to facilitate, drawn out, contentious proceedings about changing spectrum allocations and developing service rules. But sometimes the delays are attributable to the sheer size and difficulty of the proceedings – difficulties that could not be overcome by an arbitrary first-come, first-served processing scheme.

² *Notice* ¶ 3.

The Hughes Ka Band GSO FSS SPACEWAY application serves as a case in point. Hughes first filed its SPACEWAY application in December 1993. That proposal fit squarely within the Part 2 allocations and Part 25 service rules that had been adopted in 1983. Yet the Commission did not place that application on public notice for almost two years, and it did not issue a license to Hughes until May 1997. Why did it take Hughes almost 4 years to get a license? Was it a flaw in the Commission's licensing approach? Not in the least. The issue was simply that the Ka band became the subject of a major spectrum "war" involving LMDS, FS, GSO FSS, NSGO MSS and NGSO FSS interests clamoring over the same bandwidth. No licensing was feasible until the associated rulemaking proceeding was resolved in July 1996.³ The Commission issued the first license in the Ka band processing round in March 1997⁴ and the rest in May 1997.⁵ The Commission's processing round approach worked perfectly here – and first-come, first-served model would not have improved the timing in any meaningful manner.

Less than a year ago, in response to a petition for reconsideration of its *DISCO I* decision, the Commission affirmed its 1996 decision to consider all FSS space station applications, whether for domestic or international service, in consolidated

³ Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, 11 FCC Rcd 19005 (1996).

⁴ Teledesic Corporation Application for Authority to Construct, Launch, and Operate a Low Earth Orbit Satellite System in the Domestic and International Fixed Satellite Service, 12 FCC Rcd 3154 (1997).

⁵ See, e.g., GE American Communications, Inc. Application for Authority to Construct, Launch and Operate a Ka-Band Satellite System in the Fixed-Satellite Service, 12 FCC Rcd 6475 (1997).

processing rounds.⁶ Two parties had sought reconsideration of a number of aspects of the *DISCO I* decision, including the adoption of processing round procedures for international satellite systems. In rejecting those challenges, the Commission correctly noted that processing rounds “help identify and resolve mutually exclusive applications by freezing the number of applications to be considered at a particular time,” and concluded that the “use of processing rounds will not unduly delay the authorization of satellite services.”⁷ Yet, in a *Notice* issued only six months later, the Commission suggests that there are irreconcilable problems with its long-standing licensing process.

B. The Stated Premises For Changing Satellite Licensing Procedures Are Unfounded.

None of the Commission’s stated premises for abandoning processing rounds withstands scrutiny. Paragraph 11 of the *Notice* provides five premises for the proposed changes in the Commission’s licensing procedures: (1) delays in licensing impose an economic cost; (2) the current procedure “is not well suited to the technologically advanced, new satellite services of today;” (3) changes in ITU procedures have heightened the need for faster licensing; (4) good spectrum policy demands that licenses be awarded as soon as possible; and (5) the FCC should revise its procedures when to do so is in the public interest.⁸

1. The cited delays do not require the proposed solution.

⁶ Amendment to the Commission’s Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems and DBSC Petition for Declaratory Rulemaking, *Order on Reconsideration*, 16 FCC Rcd. 15579 (2001) (the “*DISCO I Reconsideration*”).

⁷ *DISCO I Reconsideration* ¶ 30.

⁸ *See Notice* ¶ 11.

The first, third and fourth premises say essentially the same thing: delays are bad, because speed is good.⁹ This, of course, is a tautology. More important, however, the Commission fails to distinguish between delays in licensing that result from its licensing policies *per se*, and those delays that result from other causes. As noted above, almost three of the four years it took for Hughes to obtain its SPACEWAY license were directly attributable to essentially unavoidable rulemaking proceedings, or the simple fact that the application was not accepted for filing and placed on public notice for almost two years.

Much of the delay in the Celsat licensing proceeding that the Commission cites is similarly attributable to rulemaking proceedings.¹⁰ First, while Celsat initially came to the FCC in 1991,¹¹ the 2 GHz band was not allocated for MSS service in the United States until 1997,¹² and the Commission did not set up service rules for this band until August 2000.¹³ Thus, the legal framework for granting this application was not in place until just eleven months before its application was granted.¹⁴ Again, what took time in that proceeding was adopting service rules, not the license processing round. Thus, the Commission has often acted suitably quickly once allocation and service rules issues were resolved.

⁹ Particular ITU problems are addressed *infra*.

¹⁰ See Notice ¶¶ 16-18.

¹¹ Cf. Notice Separate Statement of Commissioner Kathleen Abernathy.

¹² Amendment Of Section 2.106 Of The Commission's Rules To Allocate Spectrum At 2 GHz For Use By The Mobile-Satellite Service, 12 FCC Rcd 7388 (1997).

¹³ The Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band, 15 FCC Rcd 16127 (2000).

¹⁴ Celsat America, Inc., Concerning Use of the 1990-2025/2165-2200 MHz and Associated Frequency Bands for a Mobile-Satellite System, 16 FCC Rcd 13712 (2001).

2. **Nothing about today’s technology, as such, would justify a “first come” licensing approach.**

The second premise – that processing rounds are not well-suited to “technologically advanced” satellites of today – likewise appears to afford blame in the wrong place.¹⁵ When applicants seek applications for services that have not yet been established, or for bands that must be cleared of incumbent licensees, these applications naturally create regulatory issues and challenges for the Commission. In essence, the Commission must decide whether to clear the proposed band, or to authorize the proposed service, and it must by necessity carefully consider the competing claims of the applicant, incumbents, and competing applicants.

However, even the proposed first-come approach does not purport to solve the delays that are inherent in allocation and service rule changes. Indeed, the *Notice* correctly recognizes that even under a first-come approach, no licenses can be issued until service rules and allocation issues are resolved.¹⁶ And, of course, these issues may take time to resolve. By way of comparison, the Commission was directed by statute in 1994 to reallocate and auction the 700 MHz spectrum “not later than” September 30, 2000 – but it has yet even to hold that auction.¹⁷ Thus, this premise for changing satellite licensing policy does not bear scrutiny.

3. **The Commission should of course improve its procedures where possible.**

¹⁵ *Notice* ¶ 11.

¹⁶ *Notice* ¶¶ 35-36.

¹⁷ *See* Pub. Law 106-113, 113 Stat. 1501, Appendix E, Section 213. *See also* 145 Cong. Rec. at H12494-94, H12501 (Nov. 17, 1994).

The fifth premise states the obvious – that the heart of every Commission decision and policy should be whether the public interest would be served. But this again begs the question – it is far from clear how the proposed changes would serve the public interest. Indeed, the need to facilitate the rapid deployment of new services, while balancing the need to ensure a fair and legally-sustainable licensing process, was the fundamental basis for adopting processing round procedures from the beginning.

There is no question that Hughes and the rest of the industry prefers that the Commission license satellites in an expeditious manner. And there are a number of marginal problems identified in the *Notice* that should be addressed. But processing rounds can and do work – they have in the past gone from start to finish in less than two years.¹⁸ The Commission should not throw out the proverbial baby with the bathwater – these marginal problems demand remedies at the margins, not wholesale changes that would disrupt the entire industry when the telecommunications and technology sectors are in financial turmoil.

II. FIRST-COME FIRST-SERVED IS LEGALLY UNSUSTAINABLE.

First-come licensing is not only unnecessary, it is legally unsustainable. A first-come licensing scheme would run directly afoul of the Ashbacker requirement that the Commission not grant one of two mutually exclusive applications without holding a comparative hearing and making a public interest determination.¹⁹ The Communications Act provides three possible ways to assign licenses – by lottery, at auction, or by a public

¹⁸ See *Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service*, 3 FCC Rcd 6972 (1988) (Public Notice issued June 1987; applications granted December 1988).

¹⁹ See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

interest determination – and first-come licensing is none of these.²⁰ And because adopting a first-come rule would reverse without apparent justification a long-standing agency policy, its adoption would be arbitrary and capricious, and reversible under the Administrative Procedure Act.²¹

A. The Communications Act Does Not Authorize First-Come Licensing.

Section 309 of the Communications Act²² provides exactly three ways by which the Commission may award licenses among mutually exclusive applicants. Depending on the circumstance, it can auction them off under section 309(j).²³ Or it can award them by lottery under 309(i).²⁴ Or it can establish baseline qualifications and make a public interest inquiry under 309(a) and 309(e) to determine to whom it should award the license.

Nowhere among those options is first-come first-served licensing to be found. Plainly, Congress knows how to establish alternative licensing schemes, and the only “non-traditional” schemes it has authorized are lotteries and auctions. The three licensing schemes that are authorized are highly defined as to how they may be implemented, and where they may apply. Under Sections 309(a) and 309(e), a “public

²⁰ See 47 U.S.C. § 309.

²¹ See 5 U.S.C. § 706(2); see also, e.g., *AT&T v. FCC*, 974 F.2d 1351, 1355 (D.C. Cir. 1992) (finding that change in longstanding price cap rules “is arbitrary and capricious”). This point is discussed in detail *infra*.

²² 47 U.S.C. § 309.

²³ Most satellite licenses, of course, cannot be auctioned. See 47 U.S.C. § 765f.

²⁴ The Commission’s lottery authority as to all but noncommercial educational broadcast licenses expired on July 1, 1997. 47 U.S.C. § 309(i)(5).

interest”²⁵ determination on the merits after a “full hearing”²⁶ is the default licensing process. In accordance with the plain text of the statute, courts have consistently concluded that “[t]he comparative hearing process is unquestionably the standard method for the Commission to resolve mutually exclusive applications.”²⁷

To the default process of comparative hearings, Section 309 provides two narrow exceptions. Section 309(i) permits licensing by “random selection,” but only in extremely limited circumstances: Since 1997, lotteries have only been authorized for “noncommercial educational broadcast station[s]” and for “public broadcast station[s],” as defined by the Act.²⁸ And when the Act does permit lotteries, it specifies with great precision how they are to be held: The Commission must determine the qualifications of applicants in accordance with a specified procedure;²⁹ it must grant preferences to “diversify” communications ownership and ownership by “minority group[s];”³⁰ it must prescribe antitrafficking and other rules;³¹ and so on. The Commission’s lottery authority, then, is a narrowly limited authority that applies only in narrowly limited circumstances.

Likewise the Commission’s auction authority is highly constrained.

Again, the Commission is limited in the types of licenses it can auction: it cannot auction

²⁵ 47 U.S.C. § 309(a).

²⁶ 47 U.S.C. § 309(e).

²⁷ *Aeronautical Radio Inc. v. FCC*, 928 F.2d 428, 450 (D.C. Cir. 1991) (“*ARINC*”).

²⁸ 47 U.S.C. § 309(i)(5) (July 1, 1997 sunset as to all but specified category of stations); 47 U.S.C. § 397(6) (defining permitted category of stations).

²⁹ § 309(i)(2).

³⁰ § 309(i)(3).

³¹ § 309(i)(4).

public safety, noncommercial broadcast, digital TV³² or certain satellite licenses,³³ among others. And as with the lottery authority, the auction authority must be exercised in a very specific way: The Commission must design the auction and prescribe regulations to achieve certain enumerated ends, such as promoting “small businesses,” ensuring “efficient and intensive” spectrum use, and avoiding “unjust enrichment.”³⁴ And the Commission is limited in its ability to consider certain other enumerated ends, such as obtaining federal revenues.³⁵

Indeed, the rules specifying when and how the Commission may exercise its lottery and auction authority together fill more than a dozen pages in the U.S. Code. In sum, then, where the Communications Act provides exceptions to the “standard method”³⁶ of public interest determinations based on hearings, those exceptions are well-defined, and extremely limited. There is simply no room in this tightly-drawn statutory scheme for a first-come first-served approach.

B. First-Come Licensing Would Violate *Ashbacker*.

1. Controlling authority precludes a pure first-come licensing system.

The Communications Act gives applicants the right to a hearing before they are denied: when the Commission is “unable to” find that grant of a license application would be in the public interest, “it shall formally designate the application for

³² § 309(j)(2).

³³ 47 U.S.C. § 765f.

³⁴ § 309(j)(3), (4).

³⁵ § 309(j)(7).

³⁶ *ARINC*, 928 F.2d at 450.

a hearing.”³⁷ The Supreme Court held in *Ashbacker Radio Corp. v. FCC*³⁸ that the Commission therefore must hold a comparative hearing before deciding among mutually exclusive license applicants, reasoning that “if the grant of one effectively precludes the other, the statutory right to a hearing which Congress has accorded applicants before denials of their applications becomes an empty thing.”³⁹

The Court in *United States v. Storer Broadcasting*⁴⁰ refined the *Ashbacker* doctrine slightly – but not as described in the *Notice*. *Storer* brought *Ashbacker* into accord with the general rule of administrative law that an agency can adopt prospective rules that would effectively control the outcome of an individual case. The applicant in *Storer* was clearly foreclosed by the Commission’s multiple ownership rules, but claimed that the statutory right to a hearing should preclude the Commission from properly adopting and following such dispositive rules. The Court disagreed: “we cannot interpret § 309[(e)] as barring” such rules.⁴¹ And the Court agreed instead with the Commission that where an applicant is foreclosed by the validly promulgated general rule “a full hearing, such as is required by § 309[(e)] would not be necessary on all such applications.”⁴²

The *Notice* seriously misreads *Storer* to suggest that case somehow can validate a licensing scheme that awards a license to one of two mutually exclusive

³⁷ 47 U.S.C. § 309(e).

³⁸ *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

³⁹ *Id.* at 330.

⁴⁰ *United States v. Storer Broadcasting*, 351 U.S. 192 (1956).

⁴¹ *Id.* at 203.

⁴² *Id.* at 205.

applicants without a comparative hearing.⁴³ *Storer* stands for the unremarkable proposition that the Commission may adopt prospective regulations that may dictate the result of later licensing decisions, and that in such cases the Commission need not go through the absurd charade of holding a “full hearing” to ratify a result foreordained by the prospective rule. *Storer* allows the Commission to grant the administrative equivalent of a summary judgment before trial.

The *Notice* would read *Storer* to authorize the Commission to adopt a first-come rule, the effect of which would run contrary to *Ashbacker* and the Communications Act. Under the first-come licensing proposal in the *Notice*, no chance for a Section 309(e) hearing would ever exist for a satellite applicant, because no satellite application would ever be mutually exclusive to any other satellite application. In effect, the *Notice* reads *Storer* to provide a end-run around the mandates of *Ashbacker* and Section 309. By this *Storer*-trumps-all theory, the Commission could adopt a rule that henceforth, mutually exclusive applications shall be resolved by flipping a coin. Or by throwing darts. Or by a race to Secretary’s office.

Plainly *Storer* would not allow the Commission to avoid, under the pretense of a prospective rule, the hearing requirement of Section 309(e) and *Ashbacker*. This reading is foreclosed not only by the language of *Storer* itself, but also by the more recent decision of United States Court of Appeals for the D.C. Circuit in *Aeronautical Radio, Inc. v. FCC*⁴⁴ (“*ARINC*”). That case involved MSS licensing. The Commission adopted a rule that effectively prohibited applicants from acquiring an MSS license on their own, but required them instead to join a single license-holding consortium along

⁴³ *Notice* ¶ 64.

with all the other applicants who otherwise would have been mutually exclusive. In court, the Commission argued from *Storer* that it may abolish mutual exclusivity along the lines proposed in the instant *Notice*, “that it may forgo comparative hearings and adopt a consortium approach in the exercise of its rulemaking authority.”⁴⁵

The United States Court of Appeals for the D.C. Circuit rejected this theory. It reasoned that “any such departure from the statutorily prescribed and judicially recognized practice of resolving mutually exclusive applications through comparative hearings must be premised on some truly compelling grounds that are special to the particular proceeding.”⁴⁶ The court examined the Commission’s proffered reasons – which bore a strong likeness to the reasons asserted in the *Notice* for the proposed first-come scheme – and found them utterly lacking: “While we concede that delay, expense and arduous choices are among the burdens associated with comparative hearings, they are the burdens that Congress found to be outweighed by the benefits of a reasoned assessment of the public interest by the agency entrusted with furthering that interest.”⁴⁷

ARINC controls the issues raised in this proceeding. Processing rounds may be “arduous,” but that is not a valid reason to replace them with a first-come approach, without regard to the public interest. The Commission simply cannot escape its obligation to make “a reasoned assessment of the public interest” by setting up rules that ensure that it never has a chance to make that determination.

2. ***FM Radio* does not save first-come licensing.**

⁴⁴ *Aeronautical Radio Inc. v. FCC*, 928 F.2d 428 (D.C. Cir. 1991).

⁴⁵ *ARINC*, 928 F.3d at 450.

⁴⁶ *Id.* at 452.

⁴⁷ *Id.*

The *Notice* bases its analysis largely upon the “cut-off” procedures used in the *FM Radio* licensing scheme.⁴⁸ The *Notice* analogizes its first-come proposal to the *FM Radio* scheme, and implies that *FM Radio* thus establishes the legality of the first-come proposal.⁴⁹ In fact, neither proposition is accurate: The *FM Radio* scheme does not resemble the first-come proposal, and *FM Radio* lacks precedential authority.

a. *FM Radio* lacks precedential authority.

As an initial matter, *FM Radio* does not provide any precedential value. The *FM Radio* rules were ultimately upheld by the Ninth Circuit, but without a published opinion. By Circuit Rule, any unpublished opinion is “not binding precedent,” and “may not be cited” for any precedential or persuasive value.⁵⁰

Moreover, it is far from clear that the Ninth Circuit was even presented with the *Ashbacker* question. Indeed, from the Order on Reconsideration it appears that the lone petitioner/appellant, Eric Hilding, did not present the court with that argument.⁵¹ Indeed, Hilding “generally support[ed]” the *FM Radio* licensing scheme, except that he wanted the Commission to adopt “a true ‘first come/first serve’ system,” *without* the 30-day filing window that allowed applicants the opportunity to become mutually

⁴⁸ *Notice* ¶ 28.

⁴⁹ *E.g. Notice* ¶ 63.

⁵⁰ 9th Cir. Rule 36-3.

⁵¹ Hilding was at the time the sales manager for a pair of stations in Santa Cruz *See* Local Morgan Hill Radio Assoc., *Hearing Designation Order*, 3 FCC Rcd 2682, ¶ 3 (1988).

exclusive.⁵² In other words, Hilding’s proposal presented far worse *Ashbacker* problems than did the Commission’s *FM Radio* licensing scheme.

The Commission refused to adopt Hilding’s “true” first-come proposal, noting that while it “would expedite service” and “radically reduce applications processing requirements,” the Commission “must strike a balance between the dual and sometimes divergent goals of selecting the best possible applicant and the commitment to bring new service to the public as expeditiously as possible.”⁵³ Thus, it appears that no party sought reconsideration of, or appealed, the *FM Radio* scheme on *Ashbacker* grounds.

b. *FM Radio* was unlike the first-come proposal.

That no court ever passed on the *Ashbacker* issues arising from the *FM Radio* policy perhaps stems from the fact that *FM Radio* was able to sidestep some of the critical shortcomings of the proposed first-come scheme. Specifically, the *FM Radio* scheme provided notice to parties before their rights were cut off, and it provided a window during which parties could file mutually exclusive applications – somewhat akin to the Commission’s current satellite processing round policy.

i. *FM Radio provided notice.*

Unlike the first-come proposal in the *Notice*, the *FM Radio* licensing approach provided all potential applicants with notice and a right to be heard before their rights were foreclosed. The *Notice* fails to recognize that *before* “a channel [was] added

⁵² Amendment of Sections 73.3572 and 73.3513 Relating to Processing of FM and TV Broadcast Applications, *Memorandum Opinion and Order*, 59 RR2d 100, ¶ 3 (1985) (the “*FM Radio Reconsideration Order*”).

⁵³ *Id.* ¶ 4.

to the Table of Allotments,”⁵⁴ the Commission held a notice-and-comment rulemaking to determine whether to add that channel. Interested parties thus had notice of, and an opportunity to participate in, the proceeding surrounding that allotment. Then, once a new allotment was made, the Commission issued a public notice and published the new allotment in the Federal Register, thus providing “notice to the world of a channel’s availability.”⁵⁵

In the *FM Radio* orders, the Commission recognized the importance of providing notice – something that is entirely lacking in the proposed first-come regime. The Commission recognized that although it retained discretion to define what applications would be considered “mutually exclusive,”⁵⁶ “any regulations limiting the right to a hearing must give fair notice to the public of what is being cut-off.”⁵⁷ The Commission concluded that public notice of the initial allocation, together with the notice-and-comment rulemaking that led up to the allocation, provided adequate notice of “the channel’s availability.”⁵⁸

ii. *FM Radio provided a 30-day filing window.*

Yet even after providing notice in *FM Radio*, the Commission did not launch directly into a first-come licensing scheme. Under *FM Radio*, after the Commission made a new allotment, it set an additional period before it closed off the ability to file mutually exclusive applications. This way, “interested parties” were

⁵⁴ Notice ¶ 30.

⁵⁵ *FM Radio Order* ¶ 18.

⁵⁶ *FM Radio Order* ¶ 16.

⁵⁷ *FM Radio Order* ¶ 17 (citing *Ridge Radio v. FCC*, 292 F.2d 770, n.6).

⁵⁸ *FM Radio Order* ¶ 18 & n.22.

specifically put on notice not only that the channel was available, but also “that the Commission will grant the vacant channel to a sole qualified applicant.”⁵⁹ The Commission took cognizance of the statutory requirement that applications “cannot be granted for thirty days following public notice.”⁶⁰ And this requirement led the Commission to adopt a 30-day filing window, treating all applications received within that period as mutually exclusive, and resolving them in a comparative hearing.⁶¹

At the time, the Commission described its *FM Radio* procedures as “window filing – first come/first serve,”⁶² but it specifically refused to adopt a “‘true’ first come” scheme.⁶³ And indeed, it appears that the vast majority of licenses issued under the *FM Radio* scheme were to applicants who filed within the initial 30-day period, rather than by the fallback, first-come approach. In actuality and in practice, the *FM Radio* scheme resembled the system of processing rounds now used in satellite licensing. Even at the agency level, *FM Radio* does not establish a precedent for the first-come proposal in the *Notice*.

- iii. *The proposed first-come licensing scheme lacks the important procedural safeguards provided by FM Radio.*

⁵⁹ *FM Radio Order* ¶ 18. The *FM Radio Order* also relied not only on the 30 day filing window to provide adequate notice, but also found that the notice-and-comment rulemaking by which a channel is allotted provided additional notice to those who might wish to apply. *Id.*

⁶⁰ *FM Radio Order* ¶ 16.

⁶¹ *FM Radio Order* ¶¶ 28-29.

⁶² *FM Radio Reconsideration* ¶ 4.

⁶³ *Id.* ¶ 3.

The *Notice* correctly recognizes that “[m]ost satellite services are not planned services.”⁶⁴ But it erroneously concludes that the notice and filing window provisions provided in *FM Radio* would therefore be unnecessary.⁶⁵ On the contrary, in an unplanned service, notice is even *more* important than in a planned service. In an unplanned service, a would-be operator has on the drawing boards a frequency or orbital location in which he would like to operate, but, absent notice of the initiation of a processing round, he cannot know if or when those plans might be foreclosed. He cannot know whether his anticipated spectrum and orbital location might be unavailable until someone applies for a system that would interfere with or otherwise foreclose his use. The less determinate a service is – the more unplanned it is – the less prospective licensees will be able to predict without specific notice what licenses may become unavailable. In an unplanned service, no one can know what might be foreclosed by a competing user until another application is filed.

Fundamental fairness and due process, as well as the Communications Act and *Ashbacker*, dictate that before a license is irrevocably committed to another, members of the public be afforded the chance to “speak now or forever hold their peace.” The first-come approach proposed here simply does not provide that chance. In *FM Radio*, the Commission considered that the 30-day filing window was necessary (and, together with the comment cycle on the initial allocation, sufficient) to satisfy the

⁶⁴ *Notice* ¶ 31.

⁶⁵ *Id.*

requirements of Section 309 and *Ashbacker*.⁶⁶ But the first-come the proposal here lacks that and other procedural safeguards, and therefore can take no solace from *FM Radio* scheme.

3. **The plain terms of Section 309 preclude first-come licensing.**

Nor is the first-come scheme saved by any changes to the Communications Act. The *Notice* states that Congress “has since modified the Act to make available to the Commission alternatives to comparative licensing schemes,” and reads the requirement of 309(j) that certain licenses be auctioned as “a clear indication that Congress does not consider the comparative hearing processes to be the exclusive means of effecting the public interest.”⁶⁷ True enough, so far as it goes.

However, that the Act now provides two specific alternatives to comparative hearings does not mean that Congress has also authorized allocation by whatever method it deems appropriate – by “rock-paper-scissors,” or by first-come first-served. By presuming that it does, the *Notice* violates the rule that *expressio unius est exclusio alterius*, which the Supreme Court recently applied to conclude that “Congress implicitly excluded a general . . . rule by explicitly including a more limited one.”⁶⁸ The interpretation in the *Notice* would be like construing a list that specified “Grade A Washington State Granny Smith apples, Grade A Washington State Red Delicious apples, and Grade A New York State Bartlett pears,” to also include “hot dogs.” There is

⁶⁶ Hughes takes no position now as to whether the filing window (or any other aspect of the hybrid processing scheme) would have allowed the *FM Radio* scheme to survive scrutiny under *Ashbacker* and Section 309.

⁶⁷ *Notice* ¶ 65.

⁶⁸ *TRW v. Andrews*, 534 US 339, 346 (2001); see also *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163, 168 (1993) (applying *expressio unius maxim*).

no indication that Congress intended its specific revisions to allow auctions and lotteries somehow also provided blanket authorization for the Commission to adopt any licensing scheme that might seem appropriate. There is no indication that Congress intended to overrule *sub silentio* the longstanding rule of *Ashbacker*. The Communications Act is quite explicit in how the Commission may award licenses, and first-come first-served simply is not one of the options.

C. Nothing Would Support A Reversal Of Agency Policy Under These Circumstances.

Less than a year ago, the Commission considered and reaffirmed the use of processing rounds.⁶⁹ It concluded that “the use of processing rounds will not unduly delay the authorization of satellites systems.”⁷⁰ And because processing rounds “help identify and resolve mutually exclusive applications,” and were “support[ed] in the record,” the Commission found that continued “use of processing rounds is justified on the merits.”⁷¹

The courts “emphatically require[] that administrative agencies adhere to their own precedents or explain any deviations from them.”⁷² “Though the agency’s discretion is unfettered at the outset,” that discretion becomes constrained once it follows

⁶⁹ Amendment to the Commission’s Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems and DBSC Petition for Declaratory Rulemaking, *Order on Reconsideration*, 16 FCC Rcd. 15579 (rel. Aug. 16 2001) (the “*DISCO I Reconsideration*”)

⁷⁰ *DISCO I Reconsideration* ¶ 30.

⁷¹ *Id.* ¶ 29.

⁷² See, e.g., *Greyhound Corp. v. ICC*, 551 F.2d 414, 416 (D.C. Cir. 1977) (vacating an order of the ICC for failure to explain deviation from the agency’s precedent).

a given policy, and “an irrational departure from that policy” will be overturned upon review.⁷³

Once an agency has determined that a particular course of action best fulfills its statutory mandate, it bears a heavy burden to demonstrate facts or circumstances that lead it to adopt a different course of action.⁷⁴ As the United States Court of Appeals for the D.C. Circuit has reiterated numerous times, altering or reversing an existing policy requires *an affirmative showing of the change in circumstances that justify a departure from prior policy*: “[A]n agency acts arbitrarily and capriciously when it abruptly departs from a position it previously held without satisfactorily explaining its reason for doing so. Indeed, where an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.”⁷⁵

Having determined six months before the *Notice* issued that processing rounds are the best way to treat satellite applications in accordance with its statutory obligations,⁷⁶ the Commission now must explain any change in its interpretation. Yet

⁷³ *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996).

⁷⁴ *See Atchison*, 412 U.S. 800 at 807 (“A settled course of behavior embodies the agency’s informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress.”).

⁷⁵ *Wisconsin Valley Improvement v. FERC*, 236 F.3d 738 (D.C. Cir. 2001) (finding a sudden change in fee structures lacking a proper supporting explanation arbitrary and capricious) (internal quotations and citations omitted). *See also AT&T v. FCC*, 974 F.2d 1351, 1355 (D.C. Cir. 1992) (faulting the FCC for failing to explain why it “changed the original price cap rules” and concluding that the Commission’s “Reconsideration Order is arbitrary and capricious for want of an adequate explanation”).

⁷⁶ *DISCO I Reconsideration* ¶ 29.

courts remain appropriately skeptical of such changes in interpretation: More than once, the Supreme Court has reiterated that “[a]n agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is entitled to considerably less deference than a consistently held agency view.”⁷⁷ The Commission bears a heavy burden to demonstrate that its prior determinations about the efficacy of processing rounds should now be set aside, and on the current record it simply cannot sustain that burden.

III. FIRST-COME FIRST-SERVED LICENSING OF SATELLITES IS NOT FEASIBLE.

A. First-Come Licensing Would Create Harmful Uncertainty.

Wholesale change – even when it is for good cause – inevitably causes dislocation and uncertainty. Even if a first-come licensing scheme made sense (which it does not), the Commission’s public interest analysis must take into account the dislocation such a rule change would cause. Industry would have to analyze how best to navigate through the new legal regime. Companies would guess how the new rules will be applied and develop strategies to protect against various contingencies of how the rules might be applied. In each case they would expend resources just in dealing with the uncertainty, and in some cases they might decide to alter socially desirable behavior.⁷⁸

Likewise, the new rules would inevitably give rise to regulatory and court challenges, and potentially to litigation among the various interested parties. For example, in the 1980s, the Commission instituted the cellular lottery – one of the simplest

⁷⁷ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

licensing means imaginable. Yet even that approach resulted in massive litigation, some of which dragged on almost two decades – and into the new millennium.⁷⁹ Likewise the 1996 PCS auctions, again seemingly simple, launched a wave of litigation, some of which is now pending before the U.S. Supreme Court,⁸⁰ and delaying the initiation of service to the public.

The satellite industry simply cannot afford such uncertainty. The news media are full of stories of failed or failing telecommunications ventures.⁸¹ And satellite providers are not immune from the downturn.⁸² The Commission should always seek to avoid imposing unnecessary costs and uncertainty upon industry, but it should particularly avoid doing so in the current economic climate.

B. A First-Come Approach Would Not be as Simple as Suggested.

Almost any licensing regime can be made in summary fashion to sound simple. But the devil is always in the details. Thus, for example, the simplest regime imaginable – just holding a lottery among the qualified applicants – requires pages upon

⁷⁸ As described above, such socially undesirable behavior would include the sort of gamesmanship that the first-come regime would seem to encourage.

⁷⁹ See, e.g., Application of Cel-Tel Communications For a Construction Permit to Establish a Cellular System, *Memorandum Opinion and Order*, 16 FCC Rcd 16019 (WTB 2001) (lottery conducted in 1989; case litigated until 2001).

⁸⁰ See, e.g., Public Notice DA 00-49 Auction of C and F Block Broadband PCS Licenses NextWave Personal Communications, Inc. and NextWave Power Partners, Inc. Petition for Reconsideration, Order on Reconsideration FCC 00-332 (rel. Sept. 6, 2000); *reversed sub nom NextWave Personal Communications v. FCC*, 254 F.3d 130 (D.C. Cir. 2001); *cert. granted*, 122 S.Ct. 1202 (2002).

⁸¹ See, e.g., Dennis K. Berman and Henny Sender, “Global Crossing’s Asian Suitors Withdraw \$740 Million Offer,” *Wall St. Journal*, May 28, 2002, at B7.

⁸² See, e.g., Andy Pasztor, Globalstar’s Chapter 11 filing Reflects Lack of Restructuring Plan, Customers,” *Wall St. Journal*, Feb. 19, 2002, at B6.

pages of implementing regulations to address potential loopholes that might allow parties to game the system.⁸³ And even given those Byzantine regulations, regulatory and court proceedings still are often necessary to deal with unforeseen contingencies. Yet as the Commission addresses these details, the solutions it implements would complicate administration of the rules, delay the commencement of service to the public, place ITU priority of orbital locations at risk. Furthermore, significant time would likely be lost defending legal challenges to new “first-come” rules. These problems would strip away the only theoretical benefit of first-come licensing.

1. **The “ancillary rules” would leave first-come licensing complicated, and still exposed to gamesmanship.**

The basic problem with “first-come” licensing is that it would lead to a “gold rush.” Parties who understand that benefits will necessarily flow to the first to file will naturally race to the filing window. They will be tempted to file speculative applications to preserve their options, lest some other party beat them to the filing window. Moreover, a first-come regime might lead parties to file “blocking” applications seeking to prevent a competitor from launching a new service. If the first in line automatically receives the license, what better way to prevent a rival company from instituting a new service than to be the first to file?

a. The proposed rules would not prevent gamesmanship.

⁸³ See, e.g., Amendment of the Commission’s Rules With Regard to Frequency Allocation to Instructional Television Fixed Service, Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, *Second Report and Order*, 52 RR2d 943 (1985) (establishing ITFS and MMDS lottery rules).

The *Notice* proposes safeguards against applications filed solely or largely for the purpose of speculating, or blocking other providers' applications,⁸⁴ but those proposals would do little to address the potential for gamesmanship, and in some cases would actually encourage speculation. Even if applicants are prevented from maintaining more than a certain number of applications on file, there will still be a gold rush as companies race to protect their options by filing the maximum number, and by establishing interests in additional entities that are not "attributable" to them. Because of the presumption that anything filed will be granted as long as it is first in the queue, companies will be incentivized always to have the maximum allowable number of applications in the queue. A high-stakes application shell game could result, as companies transfer their maximum allotment among the various queues depending on estimates of competitors' plans, and what services seem most promising.

Even more difficult would be the problem of "blocking" applications. *Bona fide* satellite operators would be incentivized to file blocking applications against one another. And third party opportunists would be incentivized to block legitimate applicants as well. And while *bona fide* operators might be deterred by a limit on the number of applications they can have outstanding, that limit would prove little deterrent on a third party greenmailer – someone with no intention actually to launch and operate a satellite, who applies for a license nonetheless in the expectation that eventually a *bona fide* applicant will pay him to get out of the way. Unlike *bona fide* applicants, greenmailers do not need to exercise actual control over the applicant, or to hold the application in a particular company. Greenmailers would thus have the incentive and the

⁸⁴ *Notice* ¶¶ 51-54.

ability to establish subsidiaries and affiliates that would avoid the attribution rules, and thus would prove largely immune from the various anti-gamesmanship provisions.

Similarly, some operators might enter into arrangements with third parties somewhat akin to the “risk-sharing” arrangements in the cellular lotteries,⁸⁵ whereby the unaffiliated third party files enough blocking applications to jam up the queue, while contracting with the operator that when and if the operator files an application the third party would withdraw his own, such that the queue would miraculously disappear. In these ways and also in others that cannot now be anticipated, parties who find it in their economic interest to do so will find ways to game the Commission’s rules.

b. Eliminating antitrafficking and financial requirements will facilitate gamesmanship and speculation.

Oddly enough, at the same time the *Notice* proposes to institute a regime that is rife with opportunities for speculation and gamesmanship, it also proposes to eliminate two important safeguards against such behavior. With no baseline financial qualification requirement, first-come licensing would allow anyone at all to file a blocking application and greenmail *bona fide* applicants like Hughes. Anyone who gets wind that an operator intends to file an application could run down to the Commission and file first, and then simply wait for the *bona fide* applicant to buy him off.

This would not only greatly expand the pool of potential greenmailers, it also would expressly open that pool to those who are most likely to greenmail: It is an observable fact that greenmail tends not to come from large, well-capitalized corporations (which could meet the Commission’s financial qualification requirements). Greenmail

⁸⁵ See, e.g. Application of Algreg Cellular Engineering, *Memorandum Opinion and Order*, 7 FCC Rcd 8686 (1992).

almost always comes from individuals and their small upstart companies that are willing (and may find it necessary) to do anything to make a buck. The first-come regime would create intense pressure by potential greenmailers and speculators, and eliminating the financial requirements would release that pressure in an overwhelming flood of applications.

Likewise, without the antitrafficking rule license speculators will have free reign. Just as the cellular lottery created “cellionaires” who never built a single system or served a single customer, first-come licensing will make a whole new class of speculators rich. Nothing will prevent every dentist and lawyer in the United States from jamming up the queue with applications for satellite licenses that they intend only to sell, unbuilt, to an operator. Unlike the gold rush of 1849, where prospectors actually labored to make their claims pay, the new satellite gold rush would produce nothing that benefits society – though men will be made rich when real operators like Hughes are forced to buy their licenses.

- c. The Commission’s proposed safeguards would complicate legitimate business affairs and hinder administrative efficiency.

All of the various anti-gamesmanship proposals in the *Notice* would complicate and potentially disrupt the legitimate business affairs of *bona fide* applicants.⁸⁶ The proposed “global limit” on applications would of course prevent a provider from applying for more than five GSO locations at the same time. While this may seem not to be an onerous restriction, it could easily work in connection with the

⁸⁶ *Notice* ¶¶ 51-54.

proposed attribution rules⁸⁷ to prevent legitimate applications from going forward. A single company could not propose a global GSO satellite system with enough spectrum resources to serve each region of the world. In contrast, however, there would be no limits on the number of NGSO spacecraft that a single applicant could propose, or how much bandwidth that system could consume. As a result, U.S. companies could be forced to go “offshore” to obtain satellite licenses.

And two separately operated companies with independent business plans no longer would be able to pursue their plans simply because of overlapping stock ownership. The problem becomes particularly acute when considering the impact on joint ventures, the applications of which would apparently be attributed to both venture partners.

Likewise the prohibition on “transferring” locations in the processing in the queue would be draconian.⁸⁸ Companies merge. And the Commission’s rules recognize this, by creating an exception to the antitrafficking rules where the proposed transfer of control is incidental to the sale of the company.⁸⁹ Yet the *Notice* would apparently do away with this.⁹⁰ There is simply no policy rationale to justify a rule that would have required Hughes to lose its place in line for all pending applications when it

⁸⁷ *Notice* ¶ 52.

⁸⁸ The *Notice* claims that it would not institute a “blanket prohibition,” but then proposes “moving the pending applications of the parties in the transaction to the end of the relevant queue.” *Notice* ¶ 53. Plainly, this amounts to a prohibition on an applicant’s ability to sell or merge the company while still maintaining its all-important place in the queue.

⁸⁹ See 47 C.F.R. § 25.116(C)(2); STARSYS Global Positioning, Inc., *Declaratory Order*, 8 FCC Rcd 1662 (CCB 1993).

⁹⁰ *Notice* ¶ 53 (casually opining that eliminating this exception would not “deter a significant number of legitimate business transactions.”).

was sold to General Motors, and again when it merges with EchoStar. Even if appropriate waivers were available, the proposed rule would greatly complicate affairs and would tend to impose unnecessary costs on legitimate business transactions.

Nor is there any apparent rationale or consistency behind the *Notice*'s proposal to (1) prevent applicants from transferring spots in the queue, while (2) allowing licensees freely to transfer their unbuilt licenses.⁹¹ In fact, if the Commission intends to discourage license speculation it would do better to adopt the opposite: to allow queue transfers but prohibit license transfers. *Bona fide* operators are just as likely to transfer their business before they obtain the license as they are after they obtain the license. Speculators, by contrast, are far more likely to transfer the license once they have obtained it – rather than transferring a place in line. The proposal to treat queue transfers in this way that is fundamentally different from license transfers is without rationale, and indeed is contrary to any possible justification.

The *Notice* appears to borrow from Marie Antoinette in its off-hand disregard for the affairs of its regulated subjects. It suggests that losing a valuable place in the queue would not deter a “significant number” of legitimate transactions, and that “in most cases,” losing their places in the queue “would appear to be a small consideration,” in the context of a large satellite merger.⁹² This is a novel regulatory theory: that the rule is acceptable because it would (hopefully) do only a small amount of unnecessary harm. And it is factually incorrect: as the Commission has previously recognized, losing a pending application in the context of a merger would do real and

⁹¹ Compare *Notice* ¶¶ 109-117 (allowing trafficking in bare licenses) with *Notice* ¶ 53 (prohibition on queue place transfers).

⁹² *Notice* ¶ 53.

significant damage to the applicant, and to the public interest.⁹³ Factually erroneous and legally untenable, the proposed rule is pure caprice.

Even as these rules would complicate and damage the affairs of regulated businesses, the Commission's administrative processes would also be complicated. The task of monitoring the queues would not be easy – the Commission would have to monitor all earth station and all space station applications. And this task would be greatly complicated by the need to apply the proposed affiliation rules to all such applications – rules that have often proven to be the subject of significant disputes in the CMRS context, from which the *Notice* proposes to borrow.⁹⁴

Particularly difficult would be the task of dealing with hybrid satellites, which cannot fit into a single first-come queue.⁹⁵ While the *Notice* claims that it “do[es] not want to discourage deployment of hybrid satellites,” the first-come policy would likely do just that, as the two separate queues would seldom be aligned. The Commission's task in attempting to accommodate hybrids would be difficult indeed. Likewise, the first-come scheme could penalize hybrid applicants severely if the license for one band is granted and milestones begin approaching before the Commission is able to act on the entire package. In sum, then, the various “ancillary” rules that would attend a first-come regime would require a significant expenditure of business and administrative resources, respectively, to comply with and enforce those rules.

⁹³ See *Hughes Communications, Inc.* 59 RR 2d 502 (CCB 1985) (General Motors permitted to acquire Hughes without dismissal of MSS application of a Hughes subsidiary).

⁹⁴ See, e.g., Applications of AirGate Wireless and Cricket Holdings, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 13557 (2000) (resolving dispute over purported affiliation of Leap Wireless with QUALCOMM).

2. U.S. applicants would suffer at the ITU.

The first-come licensing scheme would work to the disadvantage of U.S. applicants at the ITU. Currently, soon after the Commission initiates a processing round, a single “generic” application is submitted to the ITU for multiple orbital slots, the technical parameters of which are sufficient to cover and include all of the U.S. license applicants in that processing round. The purpose and effect of this approach is to ensure that no ITU filing is customized in a manner that benefits only one system.⁹⁶ Thus, if an applicant is not ultimately licensed at the requested orbital location, the U.S. filing at that location is broad enough to provide priority that another applicant can benefit from should the Commission so decide.

The first-come licensing regime proposed in the *Notice* apparently would put an end to this equitable process. If the lead applicant under a first-come regime is rejected, fails to construct, or for any other reason must surrender its license, the second-place applicant might need to have the U.S. make a new filing at the ITU, which could have significantly lower priority than the filing made for the lead applicant. The second-place applicant therefore would be faced with an unsavory choice – wait in line, with the uncertainty about what ITU priority will exist when its turn arises, leave the queue and try to get in line for another orbital location, or change its proposed design to fit the

⁹⁵ *Notice* ¶¶ 59-61.

⁹⁶ For example, in the first Ka band processing round, all applicants assisted the Commission with the preparation of generic ITU filings that ensured that the filings for orbital locations where conventional “bent-pipe” transponder spacecraft were proposed by some applicants were broad enough to cover the possibility that advanced, higher-powered spot beam spacecraft proposed by other applicants could be assigned to those locations.

existing ITU filing. Either situation presents far worse consequences than any issues with processing rounds.

3. **First-come may not save any time at all.**

The *Notice* predicts that commenters might criticize first-come licensing as “overemphasizing speed of service at the expense of” substantive factors and the public interest.⁹⁷ Certainly, first-come licensing would sacrifice those substantive factors, but it is by no means clear that first-come licensing would actually improve “speed of service.” Indeed, the *Notice* puts forward no evidence that first-come licensing would save any time at all, other than a bald assertion that it would.⁹⁸

As noted above, much of the delay cited by the Commission in previous processing rounds stemmed not from the licensing process as such, but rather from disputes over the governing service rules or underlying allocations. Yet the *Notice* proposes, as it must, that when an application is processed for a frequency band for which the service rules or allocations have not been adopted, the Commission must not grant a license in that particular frequency band until it has adopted service rules or changed the relevant allocation with respect to that band.⁹⁹ To the extent that it must then withhold action on a set of applications until it resolves the competing interests of the various applicants by adopting service rules and allocations, the Commission will likely take no less time to act on the first-come applications than it did on processing round applications.

⁹⁷ *Notice* ¶ 41.

⁹⁸ *Id.*

⁹⁹ *Notice* ¶ 35.

There is no reason to believe that the Commission would find service rules or allocation proceedings less contentious, or easier to resolve, simply because there is a “lead applicant” instead of a processing round. Moreover, the *Notice* indicates that the same dynamic still will be present in first-come licensing as has traditionally plagued the processing rounds – the FCC’s reflexive need to split the baby: “We anticipate that we could use the service rules proceeding to address any issues that may arise regarding promotion of multiple service providers, if possible.”¹⁰⁰ Thus, the service rules proceeding has the potential to take on all the characteristics of the processing round proceedings. In deciding the ground rules for use of the spectrum, the Commission will still be faced with baseline determinations that help establish which competing applicants will get licenses, and what their licenses will provide. Nor is this avoidable: the Commission must at some point make these hard choices, and decide among the applicants’ competing plans for use of scarce spectrum and orbital resources.

In sum, first-come first-served licensing has little to commend it, and much against it. It would create uncertainty in an industry that desperately needs regulatory stability. It would cause administrative problems for licensees and for the Commission, and would create a strong potential for gamesmanship. First-come licensing is unlikely to speed licensing significantly – and it would not speed licensing at all in cases of complex proposals for cutting-edge satellite systems.

The first-come first-served scheme would arbitrarily deny prospective applicants the right to apply for a license, without giving them notice that they might be foreclosed from doing so. The first-come scheme would encourage – and in some cases,

¹⁰⁰ *Notice* ¶ 36.

force – prospective applicants to rush to the FCC and file protective applications. As described above, the resulting “gold rush” would give rise to speculation and gamesmanship, and would lead to a variety of transaction and error costs to the serious detriment of the public interest. First-come licensing is not a good policy.

IV. “STREAMLINED LICENSING” WOULD NOT BE STREAMLINED.

The *Notice* indicates that there are many ways by which the current processing round licensing system could be expedited.¹⁰¹ Hughes agrees. The *Notice* likewise is correct to identify negotiations among the parties as one of the sources of delay under the current regime.¹⁰² But the *Notice* misses the mark in its prescription for a remedy to that delay.

A. The FCC Should Enforce Its Rules, Not Invent New Ones.

Game theorists would regard processing round negotiations as a colossal, multiparty, game of “chicken.” They are essentially zero-sum: there is a finite amount of spectrum that must be divided among the participants, a finite number of orbital locations, and a clear order of preference among those locations. It is a chicken game, then, because whoever flinches loses – whoever budges so much as an inch simply loses that ground. And like all chicken games, the parties will posture and dig in – claiming that they’ll never swerve, they actually like car crashes, and so on – until the absolute last instant, just before the two cars collide.

The Commission, then, is correct to understand that in order to facilitate negotiations, it must make the car crash inevitable and swift. That is, the Commission

¹⁰¹ See *Notice* ¶¶ 67 *et seq.*

¹⁰² See *Notice* ¶¶ 67-69.

must be prepared to pick winners and losers if the parties are unable to negotiate a resolution among themselves. However, adoption of the criteria proposed in the *Notice* would not materially facilitate negotiations. The Commission already has rules, and criteria by which it can select among competing applicants.¹⁰³

The problem is not that the Commission lacks rules, or that the rules it has are inadequate. The problem is that the Commission has been unwilling to apply its rules. Thus, for example, though the Commission has baseline financial qualification requirements that are well-known and abundantly clear, it has recently declined to apply those rules to eliminate applicants that fail to meet baseline, *Storer*-like applicant qualifications.¹⁰⁴ Of course, some satellite applicants have become aware of this – they understand that the Commission does not intend to apply the rules on its books. Thus the chicken game stretches out indefinitely, as the parties posture and quarrel and never see the need to flinch, secure in the knowledge that the car crash will never come.

The problem is not the rules, but the fact that the Commission has declined to apply its existing rules. Rather than adopt new ways to choose among qualified

¹⁰³ See, e.g., *Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service* 94 FCC 2d 129, ¶ 4 (August 12, 1983) (“In general, we assign orbital locations to balance the desires of the applicants, the actual traffic volume and distribution requirements of the applicants, constraints on satellite locations imposed by space station design limitations, announced plans of other countries for their own satellites, and broad considerations of fair treatment of existing and new domestic satellite operators. Moreover, we also seek to minimize disruption of service to existing domestic satellite users wherever possible.”). (*Orbital Locations Order*”).

¹⁰⁴ See *Second Round Assignment of Geostationary Satellite Orbit Locations to Fixed Satellite Service Space Stations in the Ka-Band, Order, DA 01-1693* (rel. August 3, 2001) at para. 11,12; *Morning Star Satellite Company, L.L.C. Application for Authority to Construct, Launch, and Operate a Ka-Band Satellite System in the Fixed-Satellite Service, 12 FCC Rcd 6039* (1997).

applicants, the Commission should apply appropriate baseline applicant qualification criteria.

B. The Proposed Selection Criteria Would Harm, Not Help.

In a single page out of 50 and under the guise of “streamlining,” the *Notice* proposes a sweeping overhaul of the substantive rules governing satellite allocations.¹⁰⁵ Yet the Commission gives no particular reason why these criteria should be important, or why others should not. Nor does the Commission explain why these criteria would help expedite processing rounds in ways that the existing criteria do not. In fact, the proposed selection criteria would do more harm than good.

Currently, the Commission has two sets of rules that determine who should receive a satellite license. As a threshold matter it has basic qualifications – that the licensee be legally, technically and financially qualified to construct, launch and operate a satellite system.¹⁰⁶ And beyond that threshold, when deciding among several qualified and mutually exclusive applicants, the Commission applies a broad standard that allows it to take into account the often widely divergent considerations that may be important in various contexts. It takes into account traffic volumes and the need for service, technical constraints and requirements, ITU priority considerations, the need to preserve orbital locations for spacecraft licensed by foreign administrations, potential interference, and “fair treatment” of incumbents, among other factors.¹⁰⁷

¹⁰⁵ *Notice* ¶¶ 70-77.

¹⁰⁶ 47 C.F.R. § 25.140(b).

¹⁰⁷ See, e.g., *Orbital Locations Order* ¶ 4; Second Round Assignment of Geostationary Satellite Orbit Locations to Fixed Satellite Service Space Stations in the Ka-Band, *Order*, DA 01-1693 (rel. August 3, 2001) ¶ 5 (“we assign orbital locations to balance the desires of the applicants, the actual traffic volume and distribution requirements of the

To be sure, these factors do not spell out in detail what will be determinative or even important in any given comparative decision. Yet this indeterminacy is necessary and appropriate in the satellite context. A service like broadcast radio is well-suited to the use of specific comparative criteria, because it can be used only for relatively limited purposes, and those purposes are well known. Thus the Commission is able to state *ex ante* which uses will be favored – for example, local programming – and award preferences accordingly. By contrast, satellite services are relatively amorphous, and less given to an *ex ante* statement of what uses will be preferred over others – because so many uses simply cannot be anticipated. Rather than attempt to adopt specific guidelines as to what uses it will consider to be in the public interest, the Commission has in the satellite context properly taken a flexible approach to the public interest that takes into account a wide variety of factors, some of which are not present in every case.

1. The proposed criteria would in fact lead to greater indeterminacy.

If the Commission adopts specific selection criteria along the lines proposed in the *Notice*, that would paradoxically lead to greater uncertainty. The fact is that particularly in the satellite context, it is extremely difficult to know *ex ante* what selection criteria will be determinative or even important. The practical importance of various factors will vary widely depending on the service proposed, the number of slots available, orbital location, frequency, GSO versus NGSO architecture, and the state of

applicants, constraints on satellite locations imposed by space station design limitations, announced plans of other countries for their own satellites, and broad considerations of fair treatment of existing and new domestic satellite operators. Moreover, we also seek to minimize disruption of service to existing domestic satellite users wherever possible.”).

current service, to name a few.¹⁰⁸ Likewise the importance of the various factors will depend in large part on how different the various applications tend to be on those various factors – and other factors that may not be enumerated, but might assume importance in a particular proceeding. The Commission should avoid tying its hands by announcing a series of selection criteria and, presumably, the arbitrary weights attached to each, that might seem valid in the abstract but might ultimately turn out to miss the mark in any particular case.

Nor would the selection criteria be particularly obvious or concrete in their application. In fact, each of the various selection criteria could lead to vastly conflicting interpretations among the various applicants, and between the applicants and the Commission. And, paradoxically, they could thereby lead to greater litigation. There could be much doubt as to who qualifies for the various preferences, how much preference should be given, and how they should be weighed relative to other considerations.

For example, who would qualify as a “new” or “newer” entrant?¹⁰⁹ Would the Commission have to look behind the corporate name to some sort of attribution rule? What about joint ventures? Would it look to the applicant’s contractual relationships, as well? And how much importance would be attached to the relative scale – the fact that one applicant has been in the industry for 5 years, versus 30 years for another? And what about established non-satellite companies? Could AOL Time-Warner obtain a new entrance preference simply because satellites are the one media

¹⁰⁸ See, e.g., *Orbital Locations Order* ¶ 4 (citing some of these factors).

¹⁰⁹ *Notice* ¶ 71.

realm that it has not yet entered?¹¹⁰ Likewise, each of the various preferences would raise similar problems in its application.

2. The preferences lack policy justification.

Nor is there any policy justification for the various proposed preferences. Again to take the new-entrant preference, the Commission has consistently recognized that satellite service does not constitute a separate market.¹¹¹ So it is hard to understand what legitimate purpose it would serve to favor new entrants in a particular satellite band. And the new entrant preference would ignore the many good reasons that incumbents may be in a better position to launch spacecraft and utilize spectrum and orbital locations: they have the requisite experience, capital and know-how to do so. Likewise the preference could discourage joint-ventures between existing satellite providers and others – for example between an existing satellite operator and an ISP – by saddling the resulting partnership with a disadvantage relative to pure “new entrants.” Yet those partnerships could be pro-competitive and facilitate roll-out of innovative services. Nor is there any evidence that small “entrepreneurs” are suited to design, build, launch and operate satellite systems.

The proposed preference for milestone compliance is likewise of dubious merit.¹¹² When a business for valid reasons determines that it should abandon construction – because the market for a proposed service turns out not to exist, for

¹¹⁰ As discussed below, satellite service is not even considered a separate market – so it is particularly hard to understand why a preference should be granted to participate in one segment of the telecommunications industry.

¹¹¹ See, e.g., Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, *Eighth Annual Report*, FCC 01-389 CS Dkt. No. 01-129 (rel. Jan. 14, 2002) (treating DBS as one of many participants in market for MVPD).

example – the milestone compliance preference would do one of two things. Most likely, the preference would be completely ineffective as a incentive to construct systems on time, because such a profound and costly decision is based primarily on business considerations, not arcane legal niceties such as what might happen in some future licensing round. But even if it had any effect, that effect would work against the public interest by inducing inefficient investment and ultimately inefficient use of scarce orbital slots and spectrum: the licensee might be forced to build out a system for which there will be little public demand, and from which there would derive little public interest, solely in order to preserve its future options. Either way, the milestone completion preference has little merit.¹¹³

The proposed preference for licensees who have “made more progress toward providing service”¹¹⁴ would simply encourage construction of simple, generic spacecraft, and also induce inefficient investment. Applicants would be incentivized to buy a partially completed “off-the-shelf” satellite that may or may not be well suited to their particular needs, and innovation would thereby be discouraged.

The proposed rural and unserved area preference¹¹⁵ is a good example of something that might be important in some contexts but largely irrelevant in the satellite context. In all likelihood, every applicant would swear an ironclad “commitment to provide service to rural or unserved areas,” simply because such ubiquitous service is in

¹¹² *Notice* ¶ 72.

¹¹³ As discussed below, the “mandatory expenditure” milestones would be particularly bad for business: legitimate contract disputes and design changes can delay progress payments, yet the proposed mandatory expenditure milestones make no provision for these.

¹¹⁴ *Notice* ¶ 73.

the nature of how satellites operate. But if best use for a particular satellite is for an urban use, or focused on certain sectors, such as business users, the Commission should not blindly demand that the rural service be preferred. For example, one FSS provider might want to launch a satellite to provide local-into-local coverage in urban markets, while another might seek to provide nationwide paging. The pro-competitive impact of the local-into-local coverage might produce far more public interest benefit than would the paging service, and the Commission should be able to consider this on a case-by-case basis.

The proposed race-to-file preference, whereby an applicant would be preferred if it “submits its application two days before” another,¹¹⁶ is simply preposterous. It is difficult to see *why* the applicant filing 2 days before deadline should be preferred to the last-minute filer. There is no notion here that one applicant would be able to provide service materially faster than the other, or that this preference would encourage potential applicants to invest in developing innovative, new services. The proposed preference would simply encourage gamesmanship – for example to file a simple application and then to supplement and modify it later, or to encourage relatively simple, off-the-shelf filings.

V. THERE ARE BETTER WAYS TO IMPROVE SATELLITE LICENSING.

A. The Existing System Provides Important Benefits.

The Commission cannot escape the need to allocate spectrum and develop service rules. That is a core function of the agency. Because of the nature of the satellite

¹¹⁵ Notice ¶ 74.

¹¹⁶ Notice ¶ 75.

industry, in which such allocations and service rules may effectively dictate which of competing entities will be able to exploit the opportunity that is thus created, the Commission often has combined those functions together with the licensing function. This is an effective and efficient way of licensing new types of satellite systems, particularly given the difficulty of predicting *ex ante* what will be the technical specifications required by services that ultimately occupy a particular orbital location or frequency.

The fact that satellite applications often are filed before allocations and rules exist is thus a strength, not a weakness. In addition, this scheme provides the basis for optimizing U.S. applicants' ability to obtain international allocations of spectrum and orbital locations. It is particularly important to proceed in this way in the international context, as this process allows applicants and the United States to proceed at ITU and at WRCs simultaneous with license processing in the United States.

B. FCC Should Enforce Its Existing Rules.

1. Financial qualification requirements serve an important “early warning” purpose.

First and foremost, to improve the satellite licensing process, the Commission should enforce its existing rules. In particular, it should enforce its financial qualification requirements.¹¹⁷ These are not onerous requirements, nor do they impose a barrier to entry. To be “financially qualified,” a licensee must show that it has the financial resources to construct, launch and operate a satellite for one year.¹¹⁸ This is a basic requirement that common sense dictates should not be set aside: an entity has no

¹¹⁷ See 47 C.F.R. § 25.140(b).

business obtaining a license if it lacks the wherewithal to launch and operate a satellite. Moreover, this requirement weeds out companies who seek to use the licensing process as a means to greenmail serious applicants.

Construction milestones simply are not an adequate substitute for financial qualifications.¹¹⁹ To be sure, they serve “similar purposes.”¹²⁰ But they are not “duplicative”¹²¹ or identical in purpose. The two different requirements are similar to the payment and buildout requirements in the PCS services. The Commission has often reiterated the importance of the payment requirement in auctioned PCS services as a “proxy” for and an “early warning” index of the ultimate ability of the licensee to construct and operate a viable PCS system.¹²² Yet the Commission also maintains strict buildout requirements in the same service: the licensee must provide service to specific percentages of its covered population within dates certain after its initial licensing.¹²³ These are not duplicative: the initial bid and payment requirement serves as an “early warning” indicator that the licensee will likely be able eventually to construct, while the buildout requirements require the licensee actually to construct.

The Commission’s satellite rules are similar. The financial qualification requirements serve a unique “early warning” function,¹²⁴ by which the Commission is

¹¹⁸ See 47 C.F.R. § 25.114(c)(13).

¹¹⁹ Cf. Notice ¶¶ 99-108.

¹²⁰ Notice ¶ 102.

¹²¹ Notice ¶ 108.

¹²² See, e.g., *Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512 (D.C. Cir. 1999).

¹²³ 47 C.F.R. § 24.203.

¹²⁴ See, e.g., *Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512 (initial payment requirement in auctioned service said to be “early warning” device).

able, before the license is issued, to identify applicants who are likely to prove unable to construct.¹²⁵ By contrast, the construction milestones carry the *likely* ability to construct thus determined, into a concrete obligation *actually* to construct.

It is important to maintain the former as well as the latter – to maintain rules at the licensing stage that will weed out applicants unlikely to construct, and also to maintain actual construction milestones. When a license is revoked and re-assigned because the licensee failed to meet the construction milestones, the license has in the meantime been denied to another (potentially higher-value) user, and the public has in the meantime been deprived of service. Financial qualification requirements prevent this by taking the first step to predict *ex ante* who will or will not be able to build.

2. “Mandatory expenditure” milestones would not work well.

The proposed “mandatory expenditure” milestones are a poor alternative to milestones that require specific actions, rather than expenditures.¹²⁶ Any expenditure requirements would increase the potential for gamesmanship among licensees. For example, if the licensee is required to pay a certain percentage of the “total projected costs,” it will be incentivized *ex ante* to project unrealistically low total costs. Or it could structure a contract around the milestone requirements – for example to require payments, but then allow them to be refunded if work is not performed. Thus, the Commission would have to scrutinize the projected costs, and the licensee’s contract with

¹²⁵ See, e.g., Amendment to the Commission’s Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to, a Radiodetermination Satellite Service, *Second Report and Order*, 104 FCC 2d 650, ¶ 23 (1986).

¹²⁶ Notice ¶ 104.

its supplier, and the time and administrative burden required to monitor compliance would “defeat the purpose” of the mandatory expenditure milestones.¹²⁷

The mandatory expenditure milestones would also skew the relationship of operators with manufacturers. If operators are required by the Commission to pay their manufacturer specific sums of money, the operators would lose nearly all of their commercial leverage over manufacturers. That is, the operator could not withhold payment when work has not been completed, or has not been completed to specification. Nor could it cancel the contract and start over if the manufacturer fails to satisfy. The whole reason that construction contracts typically provide progress payments, as opposed to a lump-sum payment upfront, is to hold the manufacturer’s feet to the fire – to ensure a timely and quality product by maintaining financial and commercial leverage. Simply to mandate that payments be made would eliminate that leverage.

C. Certain Incremental Improvements Will Facilitate The Existing Process.

Plainly, the current process can be improved and expedited. First and foremost, the Commission should eliminate the significant delays that are wholly within its own control. In particular, Commission should put any new satellite applications on public notice promptly after they are filed. This has often been a source of significant delay. As noted above, the first SPACEWAY application did not go on public notice for almost two years. And the public notice applications for the second Ka-Band processing round did not occur until fifteen months after the filing window closed.¹²⁸ The

¹²⁷ See Notice ¶ 104.

¹²⁸ See *Public Notice*, Satellite Policy Branch Information: Satellite Applications Accepted For Filing in the Ka-band Cut-off Established for Additional Applications in

Commission should open the filing window promptly after a new application is received, and it should again put those filings on public notice very shortly after they are received. There is simply no reason to delay issuing a public notice, and that simple step could hasten the ultimate resolution by months or even years.

D. The Commission Should Facilitate the Settlement Process.

As discussed, the processing round negotiations resemble a chicken game. And like all chicken games, the game will not be decided until the last instant, when the car crash seems imminent. The Commission can facilitate a swift resolution to the negotiations by providing strict deadlines – by moving up the date when the car crash seems imminent. To this end, Hughes agrees with the Commission’s proposal to establish a deadline of 60 days after the close of the pleading cycle for the parties to negotiate a mutually agreeable solution. That period should be sufficient to allow the various parties to come to an understanding of the relative merits and flaws of all the applications, including their own, and then to fashion an appropriate solution.

While the Commission would provide a great service simply by instituting a hard deadline for negotiations, it should also take a substantive role in facilitating settlement. The Commission should take on something like a mediator’s role, informally advising the parties of its assessment of their relative positions. This advice need not come through any Order or other formal decision, but in order for it to be effective the advice must reflect the considered opinion of top Commission decision makers. It need

the 28.35-28.6 GHz, 29.1-30 GHz, 17.7 - 18.8 GHz, and 19.3 - 20.2 GHz Frequency Bands, Rep. No. SPB-106 (Oct. 15, 1997) (setting Dec. 22, 1997 filing deadline for second rounds Ka-band applications); Public Notice, Ka-band Satellite Applications Accepted for Filing, Report No. SAT-00012 (March 16, 1999) (placing applications on public notice fifteen months after they were filed).

not be unequivocal, but should provide a clear indication to each party of where its strengths and weaknesses are, such as: “we’re concerned about your financial qualifications,” or “we think you’ve made enough of a showing on that one.” If the Commission takes these two steps – impose a deadline after which it will simply decide the case, and help the parties come to an honest understanding of their relative strengths and weaknesses, the settlement process will be greatly facilitated. Indeed, if the Commission adopts these steps and seriously pursues them, it would be highly likely that parties will negotiate a settlement before the 60-day deadline.

VI. FUNGIBILITY IS A CORNERSTONE OF SUCCESSFUL SATELLITE LICENSING POLICY.

The Commission should maintain its historic policy of treating orbital locations as fungible in processing rounds.¹²⁹ This is the only way to deal with the technical requirements of *Ashbacker* when presented with multiple applications for the same orbital slot: under the fungibility policy, those applications need not be treated as mutually exclusive. Likewise the fungibility policy allows the Commission to respond easily to unforeseen problems arising at the ITU.

As the Commission has correctly noted, the significant backlog at the ITU makes it nearly impossible for an applicant to know, before it applies to the Commission, the state of ITU priority at a desired orbital location. In other words, because of the backlog “it is difficult to determine” whether the orbital slot assigned to an applicant will turn out to be available, or heavily encumbered.¹³⁰ The existence of this problem is a compelling reason to maintain the fungibility policy. Often, these facts come to light

¹²⁹ Notice ¶ 79.

after a processing round closes. If, during the course of a processing round, it turns out that there are significant ITU priority issues, the fungibility policy allows the applicant to specify another desired orbital slot without losing its place in the queue or having to initiate another processing round.

VII. THE COMMISSION SHOULD MAINTAIN ITS ANTI-TRAFFICKING RULES.

The anti-trafficking rule one is of the principal means by which the Commission successfully discourages speculation in satellite licenses. License speculation in the satellite context is bad for two main reasons. First, it may lead to significant delays in the ultimate provision of service to the public, as a “trafficked” license takes longer to get into the hands of a *bona fide* operator than if that operator was issued the license in the first instance. Second, and unique to this context, a license speculator might apply for satellite systems that are not suitable to the needs of the *bona fide* operator, thus requiring a further time-consuming license modification process that delays service to the public.

Nor would the proposed – or any other – milestone requirements be a particularly effective means of deterring speculation and trafficking. Rather, such milestones would merely place an interim obligation on the speculator, which would force the speculator either to sell the license before the milestones arrived, or to engage in some sort of useless and socially inefficient construction that would preserve the license under the rules.

Satellite licensing is in many relevant ways *unlike* licensing in the Commercial Mobile Radio Services, where trafficking in bare licenses is generally

¹³⁰ Notice ¶ 80.

permitted. In CMRS, there is no public interest determination that a company should be issued a license. There, the Commission simply gave the licenses away by lottery, or sold them by auction, without regard to the identity or the service plans of the applicants. In those contexts, where the licensing scheme itself makes the identity of the licensee essentially irrelevant, there is a valid argument that licenses should be freely transferable, for one licensee is presumably no better or worse than the other.

Satellite licenses, by contrast, must be awarded by a public interest determination, and in the case of mutually exclusive applicants by a comparative hearing.¹³¹ And, as noted above, the Commission considers a wide range of factors to inform that decision.¹³² It would be absurd to grant a license to some entity based on its identity and service plans – a particularly well-qualified applicant proposing to launch a particularly desirable service – and then allow that entity to freely transfer the license for profit the next day to a company whose qualifications and objectives have never been reviewed by the Commission.

To eliminate the anti-trafficking rule is also flatly inconsistent with the Commission's proposal to prevent entities from transferring spots in a queue.¹³³ There is simply no reasoned distinction that would justify prohibiting an applicant from transferring a spot in a queue, but then allow the same entity to sell the license the day after it is acquired. Nor is it necessary to eliminate the anti-trafficking rule in order to allow the sales of businesses.¹³⁴ The Commission can accommodate through the waiver

¹³¹ 47 U.S.C. §309.

¹³² *See supra* note 103.

¹³³ *Cf. Notice* ¶ 53.

¹³⁴ *Notice* ¶ 115.

process genuine cases of business transfers, as it did when Hughes was acquired by General Motors.¹³⁵ The anti-trafficking rule serves an important purpose, and should not be eliminated.

VIII. THE COMMISSION SHOULD ROUTINELY AUTHORIZE REPLACEMENT SATELLITES.

Hughes agrees that replacement satellites should not require processing round or first-come treatment.¹³⁶ Hughes also agrees that the Commission should streamline its processes by grant-stamping unopposed replacement satellites with technical characteristics consistent with the satellite to be replaced, or that reflect technical developments that are consistent with adjacent spacecraft. It is important that grant-stamp approval not be denied simply because a replacement satellite is somewhat more advanced than the older one, and with accordingly dissimilar technical characteristics. As the Commission is aware, due to continuing advances in technology, power levels in older satellites are usually substantially lower than they would be in a comparable satellite today and the number of transponders typically are greater. The Commission should provide for such advancement by grant-stamping unopposed replacement satellite applications with technical characteristics consistent with the satellite to be replaced, or that reflect normal technical evolution.

IX. THE COMMISSION SHOULD ALLOW, BUT NOT MANDATE, ELECTRONIC FILING.

Electronic filing is good when it works. But sometimes, because of technical problems on the applicant's end or on the Commission's end, electronic filing simply does not work. Other times it may be difficult or impossible to upload certain

¹³⁵ See *Hughes Communications, Inc.* 59 RR 2d 502 (CCB 1985).

types of attachments. Likewise experience in other services has shown that electronic filing sometimes cannot accommodate “unusual” applications. For example, it may be difficult to apply electronically for a hybrid satellite, requiring authorization in multiple bands. In these cases – where electronic filing is difficult or impossible – applicants should be allowed to file on paper.

The *Notice* observes that earth station applications can be processed more quickly when filed electronically.¹³⁷ But any analogy to earth station applications is inapposite. Earth station applications are relatively simple affairs that can be handled and processed routinely, whereas space station applications are typically vastly more complex. It is far from clear that staff would save any processing time at all when dealing with such bulky and non-routine filings electronically, but it is plain that any time savings would be infinitesimal compared to the time it takes to review and process a space station application.

Particularly if the Commission adopts a first-come scheme that grants preferences based on split-second differences in filing times, it should not force applicants to depend on the unwieldy and sometimes undependable electronic filing system. Electronic filing should be available, but applicants should not be forced to rely on it.

X. CONCLUSION

The *Notice* proposes to throw out the proverbial baby with the bathwater – to discard a system that has been in place for years, and that has generally worked well.

¹³⁶ *Notice* ¶ 120.

¹³⁷ *Notice* ¶ 118.

Satellite licensing can be improved, but first-come first-served licensing is not the answer. First-come licensing is legally untenable, and would be bad policy to boot. The Commission should instead enforce its existing rules, and adopt specific policies that would speed up resolution of processing rounds. There is no reason that a processing round should take more than two years from start to finish, and in many cases processing rounds could be completed more quickly than that. There is no reason to discard the current policy.

Respectfully submitted,

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